IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1040 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DILIPBHAI N RATHWA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1040 of 1994
MR B.K. Dave for the appellant
Ms. Hansa Punani, APP, for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 17/07/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. The appellant-original accused, by filing this appeal under Section 374(2) of the Code of Criminal Procedure ('Code' for short), has challenged the judgment and order dated August 31, 1994, passed by the learned Additional Sessions Judge, Vadodara, in Atrocity Case No.6 of 1994, whereby, the appellant was convicted for the offence punishable under Section 302 of the Indian Penal Code ('IPC' for short), and sentenced to undergo R.I. for life and fine of Rs.2000 in default S.I. for 15 days. It is ordered that, if the fine was paid, the same may be paid to the father of the deceased. The appellant was further convicted for the offence punishable under Section 3(1)(xi) of the Scheduled Castes & the Scheduled Tribes Prevention of Atrocities Act, 1989 ('Act' for short), and sentenced to undergo R.I. for two years and fine of Rs.500 in default S.I. for seven days. Both the sentences were ordered to run concurrently.

2. The prosecution case is as under:

2.1 P.W.2, Ramanlal Maganlal, was residing with his family in town Chhota Udepur. His family consisted of wife, Gangaben, five daughters and one son. The eldest daughter, Kalpanaben, was a handicapped child and the remaining four daughters were studying. August 21, 1993, was a Saturday and the timing of the school was in the morning hours. Saroj, who was the second daughter of the complainant, had left for the School around 7.30 a.m. The younger daughter, Sangeeta, had left for the School after Saroj. Sangeeta had returned soon thereafter accompanied by another daughter of the complainant, Alpana. At that time, the complainant, his eldest daughter, Kalpana, his wife Gangaben and his son were present in the house. Sangeeta had informed them that the appellant had inflicted knife blows on Saroj.

2.2 The appellant was residing just opposite the house of the complainant. As per the case of the complainant, Saroj was studying in Std VIII in S.F. High School whereas Sangeeta was studying in Std. X in Kanya Vidyalaya.

2.3 P.W.2, Ramanlal, after getting information from his daughter Sangeeta, had immediately gone to the place of the incident where appellant had inflicted knife blows on the chest of Saroj. The complainant had found that Saroj had died due to the injuries inflicted on her chest and abdominal parts of her body. Thereafter, P.W.2,

Ramanlal, had gone to Chhota Udepur Police Station and had lodged complaint against the appellant around 8 a.m. The complainant had, subsequently, learnt that the appellant had inflicted gupti blows on the deceased Saroj. The complaint lodged by P.W.2, Ramanlal, was registered at C.R. No.I-137 of 1993 of Chhota Udepur Police Station for the offence punishable under Section 302 of the IPC. P.W.8, PSI, C.M. Vasava, had immediately gone to the place of the incident and had held inquest and, thereafter, had sent the dead body for post-mortem to the Community Health Center, Chhota Udepur. Post-mortem was performed by P.W.1, Dr. B.K. Patidar. P.W.8, PSI, Vasava, had drawn panchanama of the place of the incident and had collected incriminating articles. The appellant was apprehended from his house. As the appellant had sustained injuries, he was sent to the Community Health Center, Chhota Udepur, for treatment. The father of the appellant, Nagjibhai, had produced muddamal gupti with which the blows were inflicted on the deceased Saroj. The said gupti was blood-stained and was seized under a panchanama. The panchanama of physical condition of the appellant was drawn and the blood-stained clothes put on by him were seized under a panchanama. The father of the appellant, Nagjibhai, had lodged First Information Report which was registered at C.R. No.I-139 of 1993 of Chhota Udepur Police Station for the offence punishable under Section 309 of the IPC. The statements of various witnesses were recorded by P.W.8, PSI, Vasava. The incriminating articles collected during the investigation were sent to the Forensic Science Laboratory ('FSL' for short) for analysis. P.W.8, PSI, Vasava, had obtained bona fide certificate of the deceased Saroj from S.F. High School. Yadi was sent to the Circle Inspector for preparing map of the scene of offence. During investigation, it was learnt that the appellant did not belong to Adivasi community. A communication was addressed to the Social Welfare Officer, Chhota Udepur, to make an enquiry whether the appellant, in fact, belonged to Adivasi community and was a member of tribe. On receipt of the reports from the FSL, and after completing the investigation, chargesheet came to be filed against the appellant for the offence punishable under Section 302 of the IPC in the Court of the learned Judicial Magistrate, First Class, Chhota Udepur, against the appellant, which came to be registered as Criminal Case No.2478 of 1993. As the offence under Section 302 is exclusively triable by the Court of Sessions, the learned Judicial Magistrate, First Class, Chhota Udepur, by order dated November 19, 1993, committed the case to the Court of Sessions, Vadodara, wherein it came to be numbered as

Sessions Case No.6 of 1994. The record reveals that a report, presumably, under Section 173(8) of the Code was made on March 2, 1994, to add the offence punishable under Section 3(1)(xi) of the Act, as the appellant, not being a member of a Scheduled Caste or a Scheduled Tribe, had committed offence, wherein, the victim was a member of Notified Tribe as defined under the Act.

3. Charge Exh.3 was framed against the appellant for the offences punishable under Section 302 of the IPC and Section 3(1)(xi) of the Act. The charge was read over and explained to the appellant wherein he pleaded not guilty and claimed to be tried. In order to prove the charges against the appellant, the prosecution examined the following persons:

(1) P.W.1, Dr.Babulal Kalusinh Patidar, at Exh.8
(2) P.W.2, complainant, Ramanlal Maganlal Tadvi, at Exh.11
(3) P.W.3, Sangeetaben Ramanlal Tadvi, at Exh.13
(4) P.W.4, Bhartiben Shahbhai Nayak, at Exh.14
(5) P.W.5, Rameshwar Manubhai Tadvi, at Exh.15
(6) P.W.6, Madhubhai Bhimabhai at Exh.21
(7) P.W.7, Circle Inspector, Virendra Joshi, at Exh.23
(8) P.W.8, Investigating Officer, C.M. Vasava, at Exh.25.

The prosecution also produced following documentary evidence to prove the case against the appellant:
(i) Post-mortem notes at Exh.9
(ii) Injury certificate of the appellant at Exh.10
(iii) First Information Report at Exh.12
(iv) Inquest panchanama at Exh.16
(v) Panchanama of place of the incident at Exh.17
(vi) Panchanama of recovery of clothes of the deceased at Exh.18;
(vi) Panchanama of recovery of muddamal gupti at Exh.__
(vii) First Information Report lodged by the father of the appellant at Exh.26;
(viii) Bona-fide certificate of deceased Saroj at Exh.27;
(ix) Forwarding letter to the FSL at Exh.28;
(x) Report of the FSL at Exh.29
(xi) Letter sent by the Sub-Divisional Police Officer to the Social Welfare Officer at Exh.30;
(xii) Map of scene of offence at Exh.34.
(xiii) Tribe certificate of the appellant at mark 7/15

After recording of the evidence of the prosecution witnesses was over, the appellant was questioned generally and his statement came to be recorded under

Section 313 of the Code. In the further statement, it was stated by the appellant that there was a love affair between him and the deceased Saroj which was not liked by the family members of the deceased Saroj. He stated that an attack was, therefore, launched on the day of the incident on the deceased Saroj as well as the appellant by inflicting blows with gupti. He further stated that his father had gone to lodge a complaint for launching the attack and inflicting injuries on the appellant and the deceased Saroj, but, the said complaint was not registered by the police. The appellant did not examine any witness in defence.

4. The learned Additional Sessions Judge, on appreciation of oral as well as documentary evidence and after hearing the arguments of the learned Additional Public Prosecutor and the learned counsel for the appellant, held that the prosecution had proved beyond doubt that on August 21, 1993, around 7.40 a.m. the appellant had inflicted fatal blows with gupti on the chest and abdominal parts of the deceased Saroj which was in the ordinary course of nature sufficient to cause her death and, therefore, he had committed offence punishable under Section 302 of the IPC. It is further held that the appellant, who was not a member of a Scheduled Caste or a Scheduled Tribe, had assaulted and used force on the deceased Saroj with intent to dishonour and outrage her modesty and had committed offence punishable under Section 3(1)(xi) of the Act. On the basis of the abovereferred to conclusions, the learned Additional Sessions Judge convicted and sentenced the appellant as indicated in paragraph 1 of this judgment, which has given rise to this appeal.

5. Learned advocate for the appellant, Mr. B.K. Dave, and learned Additional Public Prosecutor, Ms. Hansa Punani, have taken us through the entire record and proceedings of the appeal.

6. Learned advocate for the appellant has submitted that the prosecution has not led cogent and reliable evidence to connect the appellant with the commission of the crime. It is submitted that the testimonies of the eye-witnesses were not corroborated with the medical evidence and there was a discrepancy about the weapon used in the commission of the crime. It is submitted that Sangeeta, who claimed to be an eye-witness had deposed that the appellant had inflicted knife blow on the deceased, whereas, in the charge, it was mentioned that the appellant had inflicted gupti blows on the deceased. It is further submitted that, though the

incident had taken place on a public place, no independent witness was examined, instead, only interested witnesses were examined by the prosecution and, therefore, an adverse inference is required to be drawn against the prosecution under Section 114(g) of the Indian Evidence Act. The Investigating Officer had selected panchas, who were police witnesses, for keeping them present at the time drawing of three panchanamas. Therefore, the said panchanamas were not reliable and the trial court has erred in placing reliance on the said panchanamas for convicting the appellant. It is further submitted that the father of the appellant, Nagjibhai, was not examined even though a specific case was put up by the defence that said Nagjibhai had gone to lodge a complaint against the assailants who had launched attack with gupti on the appellant as well as the deceased Sarojben. In the alternative, it is submitted by the learned advocate for the appellant that, even if it is held that the appellant had inflicted blows with gupti, the said blows were inflicted by him as a result of grave and sudden provocation, as a quarrel had taken place between him and the deceased Sarojben while she was going to her school. The learned advocate for the appellant has, therefore, submitted that the appeal may be allowed accordingly and the conviction and sentences be reduced and modified suitably.

7. On the other hand, the learned APP has submitted that the evidence of the eye-witnesses, P.W.3, Sangeetaben, and P.W.2, Ramanlal, who is the father of the deceased Sarojben, was most reliable and trust-worthy and there was no inconsistency between ocular and medical evidence and, therefore, the learned Additional Sessions Judge has not committed any error in placing reliance on ocular and medical evidence. The learned APP has further submitted that there is no bar in selecting a panch and to keep him present at the time of drawing of various panchanamas. It is submitted that the panch witnesses are all independent witnesses and, therefore, the learned Additional Sessions Judge has committed no error in placing reliance on the evidence of the panch witnesses. The learned APP has further submitted that there was no grave and sudden provocation given to the deceased by the appellant in as much as the appellant had launched a sudden assault on the deceased when she was going to her school. It is submitted that the appellant had acted cruelly in inflicting blows with gupti and, therefore, it was proved beyond doubt that the appellant wanted to commit murder of the deceased. It is submitted that the appellant was not a member of the Tribe at the time of commission of the offence and by surreptitious means and

making false representation had obtained Scheduled Tribe Certificate which was ultimately cancelled by the Social Welfare officer. The learned APP has submitted that the conviction and sentences imposed on the appellant for the offences punishable under Section 302 of the IPC and Section 3(1)(xi) of the Act are just and proper and do not require any interference by this Court and the appeal be dismissed and the conviction and sentences be confirmed.

8. We have carefully examined the record and proceedings and reappreciated oral as well as documentary evidence.

9. The oral testimony of P.W.1, Dr. B.K. Patidar, who was at the relevant time discharging his duties as Medical Officer, Community Health Center, Chhota Udepur, and who had performed post-mortem of the deceased Sarojben, had noticed the following injuries:
"(1) Stab wound with sharp cut edges over left anterior chest 2.5 cm left to midline at the level of nipple size 1.3 x 0.5 cm cavity deep.
(2) Stab wound with sharp cut edges over left anterior towards chest wall 8 cm below the left nipple size 1.0 x 0.5 cm cavity deep. Blood oozing from the wound.
(3) Stab wound with sharp cut edges over left abdominal wall 6 cm left to ambilicus size 1.0 x 0.5 cm cavity deep."
P.W.1, Dr. Patidar, deposed that, due to piercing blow given by muddamal gupti, which had penetrated through left lung and had thereafter pierced through the heart, there was a hole in the left portion of the heart. P.W.1, Dr. Patidar, deposed that the injuries noted in the post-mortem notes were possible by infliction of blows with muddamal gupti, which was shown to him during his oral deposition. He also deposed that the injuries sustained by the deceased were in the ordinary course of nature sufficient to cause her death. In our view, the oral deposition of P.W.1, Dr. Patidar, and the post-mortem notes had proved beyond doubt that the deceased Sarojben had died homicidal death on August 21, 1993.

10. The submission of the learned advocate for the appellant that there was inconsistency in the oral evidence as compared to the medical evidence, deserves to be rejected. The evidence of P.W.1, Dr. Patidar, had indicated that the injuries sustained by the deceased were possible by means of blows given by muddamal article No.15, gupti. P.W.2, complainant, Ramanlal, and P.W.3,

Sangeeta, had deposed that the appellant had given knife blows to the deceased. In our opinion, by merely stating that the appellant had given knife blows, the case of the prosecution does not become doubtful. The appellant had suddenly launched the attack on the deceased while she was going to her school.P.W.3, Sangeeta, was following her. She had actually seen the appellant giving fatal blows on the chest and abdominal parts of the deceased. Merely stating that the appellant had given knife blows will not make the case of the prosecution doubtful. We do not find any inconsistency in the oral evidence as compared to the medical evidence.

11. The appellant while giving blows with muddamal gupti had acted cruelly and had selected vital parts of the body of the deceased for inflicting blows with muddamal gupti with knowledge and intention to cause death of the deceased Sarojben. The appellant wanted to develop his relation with the deceased Saroj, which the deceased did not like and, therefore, the appellant had wanted to take a revenge, as the deceased Saroj did not like him. The evidence of P.W.3, Sangeeta, also gets corroboration from the evidence of P.W.4, Bhartiben, who was also going to the school along with the deceased. P.W.4, Bhartiben, had categorically deposed that the appellant had inflicted blows with gupti first on the school bag, which was carried by Bhartiben. Thereafter, he had inflicted another blow on the abdominal part of the deceased. As per the panchanama at Exh.17, one book was found to have piercing cut of about 3/4". The presence of P.W.4, Bhartiben, at the place of the incident cannot be doubted. She, accompanied by P.W.3, Sangeeta, had gone to the house P.W.2, Ramanlal, to inform about the murderous assault launched by the appellant on the deceased Sarojben. Merely because the witnesses examined by the prosecution are related to the deceased or friends of the deceased, their evidence cannot be thrown, if the Court finds their evidence to be most trust-worthy and reliable and there is no reason to discard the said evidence. On the contrary, the related and interested witnesses would not spare the real culprit by implicating a false person with the commission of the crime. We do not find any error committed by the learned Additional Sessions Judge in placing reliance on the testimonies of P.W.2, complainant, Ramanlal, P.W.3, Sangeeta, and P.W.4, Bhartiben. The evidence of the eye-witnesses gets corroboration from the report of the FSL at Exh.29 and, more particularly, the report of the Serologist. The report of the Serologist indicated that on the clothes put on by the deceased, blood group "A" was detected. Earth which was collected from the place

of the incident and which was stained with blood, was having blood of Group "A". The muddamal gupti, article No. 15, was sent to the FSL and the report of the Serologist indicated that the said gupti which was stained with blood, was also having human blood of Group "A". The report of Serologist corroborated the prosecution case that the appellant had, by means of infliction of blows with gupti, committed murder of the deceased. The identity of the appellant cannot be doubted as P.W.3, Sangeeta and P.W.4, Bhartiben, identified the appellant at the trial as he was staying in the same Mohalla where the deceased and her family members were staying. It has also come in the evidence of P.W.3, Sangeeta and P.W.4, Bhartiben, that the appellant was staying just opposite the house of the deceased. Therefore, the appellant was known to the eye-witnesses.

12. The learned advocate for the appellant has submitted that the prosecution had not explained the injuries sustained by the appellant during the course of the incident. It is true that, when the appellant was apprehended by the police from his house, it was noticed that he was injured. The appellant was sent to the Community Health Center, Chhota Udepur, for treatment of the injuries sustained by him. P.W.1, Dr. Patidar, had examined the appellant at 11.45 a.m. According to the certificate issued by P.W.1, Dr. Patidar, at Exh, 10, the appellant had sustained the following injuries:

"(i) A stab wound 1x1/2x1/2 cm in left abdominal wall just below costal margin.

(ii) A stab wound of 1x1/2x1/2 cm in left abdominal wall above the umbillicus level.

(iii) A stab wound of 1x1/2x1/2 cm in right point of abdominal.

At the time of examination of the appellant, he had narrated the history of sustaining injuries by stating that they were self-inflicted injuries on the abdominal by gupti on August 21, 1993. In the said certificate at Exh.10, it was mentioned that the nature of injuries was simple and the age of injuries was within 12 hours. Merely because the appellant was injured and had taken treatment at the Community Health Center, Chhota Udepur, it cannot be assumed or presumed that he had sustained injuries during the course of the incident. On the contrary, the First Information Report lodged by the father of the appellant, Nagjibhai, which was lodged at 13.35 hrs., indicated that the injuries sustained by the appellant were self-inflicted and were caused while making an attempt to commit suicide. Pursuant to lodging of the First Information Report, offence punishable under

Section 309 of the IPC was registered against the appellant at CR No.I-139 of 1993 of Chhota Udepur Police Station. In view of the above set of circumstances and the facts emerging from the record of the case, we are of the view that the appellant had not sustained injuries during the course of the incident and, therefore, the prosecution was not bound to explain the said injuries.

13. From the arguments advanced by the learned advocate for the appellant, it is evident that the appellant wanted to plead that he had not committed offence and the assault was launched on him and the deceased Sarojben by some one else by infliction of blows with gupti. If this is the defence of the appellant and a specific case was pleaded by him that he had not inflicted blows with gupti on the deceased Sarojben, the alternative argument does not lie in the mouth of the learned advocate for the appellant that, if the Court comes to the conclusion that the appellant was responsible for causing injuries to deceased Sarojben, then it should be held that the said injuries were inflicted by the appellant as a result of grave and sudden provocation, and, that, therefore, he should be held guilty of committing an offence punishable under Section 304 Part I of the IPC. In our view, the alternative argument advanced by the learned advocate for the appellant does not deserve any merit and deserves to be rejected. There is no question of any grave or sudden provocation as the appellant had launched sudden attack on the deceased Sarojben when she was going to her school. There was no heated exchange of words nor any quarrel had taken place between the appellant and deceased.

14. As a result of foregoing reasons, the appeal is dismissed. The conviction of the appellant for the offence punishable under Section 302 of the Indian Penal Code and the sentence imposed on him to undergo R.I. for life and fine of Rs.2000 in default S.I. for 15 days, and the conviction of the appellant for the offence punishable under Section 3(i)(xi) of the Scheduled Castes & the Scheduled Tribes Prevention of Atrocities Act, 1989 and the sentence imposed on him to undergo R.I. for two years and fine of Rs.500 in default S.I. for seven days, recorded by the learned Additional Sessions Judge, Vadodara, vide judgment the judgment and order dated August 31, 1994, in Atrocity Case No.6 of 1994, are confirmed. The muddamal be destroyed in terms of the directions contained in the impugned judgment and order.

(M.H. Kadri, J.)

(H.H. Mehta, J.)

(swamy)